

OVERVIEW OF THE PROBLEMS SURROUNDING INVENTORY SEARCHES

Several months ago, Utah State Senator Mark Madsen contacted me because he had been the subject of a traffic stop and a police inventory search. Sen. Madsen was alarmed that the police officer who stopped him seemed to be using a false pretext to pull him over and then to inventory the contents of his car at the side of the road. I explained to Sen. Madsen that the United States Supreme Court has repeatedly upheld inventory searches that result was a valid arrest as constitutionally valid. *See, e.g., South Dakota v. Opperman*, 428 U.S. 364 (1976). Such searches are designed to protect both the police and arrested persons from lost or damaged property when the police take possession of evidence. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

Nevertheless, Sen. Madsen remained extremely concerned that the police appeared to be stopping citizens based on real or false traffic violations and then conducting inventory searches in an effort to fish for evidence of crimes. In response, I asked a paralegal student that has worked as an intern for UACDL to research the law on inventory searches to see if any court or state legislature had attempted to restrict the use of such searches. The results of the student's research and my own efforts to determine the state of the law have revealed that a few courts have construed their state constitutions to restrict the use of inventory searches. Other state courts have also scrutinized inventory searches for illicit motives and then have excluded the fruits of some searches when the police have exceeded the purposes of inventorying seized property. However, no state legislatures have enacted any laws to limit the use of inventory searches.

Despite the absence of state legislation, no legal reason prevents the Utah Legislature from enacting laws that would protect persons from inventory searches. The Legislature is free to provide more protection than the Federal or State Constitutions establish. For example, in the inventory search context, the courts have concluded that the police may inventory vehicles absent a search warrant. To provide persons greater protection from such warrantless searches, the Legislature could require a warrant or restrict the circumstances when the police may and may not inventory the contents of a vehicle without having to obtain a warrant.

Given that the justification for allowing warrantless inventory searches rests on liability concerns, the most obvious way the Legislature could guard against police abuses is to limit such searches to the need to protect the police and the public from lost or damaged property. Indeed, this emphasis permeates much of the case law following the Supreme Court's decisions in *Opperman* and *Bertine*. To illustrate, when the circumstances suggest that the police used an inventory search as a ruse to search for contraband, the Legislature could pass a law that requires courts to suppress the fruits of that search. More specifically, suppression could be required when a police officer confiscates drugs found in a car but fails to inventory other innocuous items that were lying next the drugs. The sole focus on the drugs strongly suggests that the police officer's purpose in searching car was to sweep for evidence and not to protect the officer from any liability.

With the purposes behind inventory searches in mind, the information below identifies various ways that the Utah Legislature could provide persons greater protection from inventory searches. In describing these approaches, keep in mind that police abuses not only occur when contraband is found. Rather, the police also conduct pretextual inventory searches when they find no evidence of a crime. When that occurs, the police violate law-abiding persons' constitutional rights and invade their personal privacy interests. Because current constitutional law does not guard against police abuses of inventory searches, legislation is needed to protect not only the guilty, but the innocent, of police misconduct.

RECOMMENDATIONS FOR RESTRICTING INVENTORY SEARCHES

I. Summary of United States Supreme Court Law on Inventory Searches

To determine which reforms the Legislature may wish to establish, a brief description of the limited scope of current constitutional law on inventory searches will assist legislators. Because the United States Supreme Court has addressed only a few of the potential issues involved in inventory searches, numerous questions remain unanswered about police officers' powers. Although this ambiguity has caused courts great confusion and created uncertainty for police officers and courts alike, it also serves as an invitation for the Utah Legislature to step in and inject clear standards for all.

The Supreme Court's opinions on inventory searches have resolved the following limited principles:

1. The police may impound vehicles that obstruct traffic, impede public convenience, or pose a safety hazard. *Opperman*, 428 U.S. at 369.
2. The police must follow standardized, written criteria and procedures when impounding property. *Bertine*, 479 U.S. at 375.
3. The Supreme Court has not determined whether the scope of the search extends to opening locked containers. But, a majority of the Court appears to have ruled that the police may open closed but unlocked containers if the police have no discretion in deciding whether or not to do so; i.e., the police act pursuant to a written policy that requires them to open and inventory closed containers. *Bertine*, 479 U.S. at 375.
4. The police may not sift through papers to look for evidence of crime unless, perhaps, some need exists to identify the vehicle owner. *Opperman*, 428 U.S. at . Rather, as a general matter, the police may only inventory the contents of a vehicle and list each document found.
5. The Supreme Court declined to constitutionally mandate allowing vehicle owners to make reasonable efforts to contact a third party to assume control over a vehicle when the owner is under arrest. *Bertine*, 479 U.S. at 373-74.

These limited rulings, leave numerous questions unanswered. For example, may the police impound a vehicle for any reason as long as the police follow their own written policies? What if a passenger in the car could take the vehicle and, thus, eliminate any need for the police to assume liability for the contents of the car? May the policed conduct an inventory search by the side of the road or must the search take place at an impound lot? These questions are the types of issues that the Utah Legislature should address.

II. Approaches on Limiting Inventory Searches

In restricting the reach of inventory searches, the Legislature may approach the subject from two separate perspectives. First, inventory searches are only needed to protect the police protect from liability when the police impound property and store it. Thus, the Legislature could define the conditions when the police may impound property. Second, the Legislature could define the scope of inventory searches once property has been impounded. Case law throughout the country identifies several possible limits under both approaches.

III. Limits on When the Police May Impound Property

- A. Any statute that allows for impoundment based on all types of police encounters is likely overbroad and unconstitutional. *People v. Krezen*, 397 N.W.2d 803, 805 (Mich. 1986). Therefore, the Legislature could bar the police from impounding vehicles based on minor traffic offenses, including driving without insurance or a valid driver's license, speeding, equipment violations, etc. *State v. Gauster*, 752 N.W.2d 496, 503-04 (Minn.2008); 3 Wayne R. LaFave, Search and Seizure § 7.3(c) (2010).
- B. Even arrests for misdemeanors may not constitutionally support impoundment. *Gauster*, 752 N.W.2d at 503 n. 3.
- C. The Legislature could do what the Supreme Court opted not to in *Bertine* and require the police to allow arrested persons a reasonable opportunity to contact a third party to retrieve vehicles and, thus, obviate any need for impoundment. *Gauster*, 752 N.W.2d at 507.
- D. The police could be required to obtain informed, verbal consent from drivers before an inventory search:

“If a vehicle is legally impounded and its owner or permissive user is present or otherwise known at the time the vehicle is seized no such need is ordinarily manifest. If the owner or permissive user does not consent to the routine inventory he will assume the risk that items obtained in the vehicle will be lost or stolen. The police in such a case merely lock up the vehicle and leave it in place until the owner or permissive user makes suitable arrangements for its removal.

Wagner v. Commonwealth, 581 S.W.2d 352, 357 (Ky. 1979). This proposal could be easily rendered ineffective, however, because of the coercive nature of police encounters.

- E. The Legislature could also require law enforcement to present drivers a written waiver of liability which, if signed, would protect the police from any liability and eliminate the need to inventory vehicles. This proposal raises numerous concerns, however, about whether police officers should be placed in the position of legal advisor when they likely have incentive for drivers to waive liability and to conduct a search.

IV. Limits to Inventory Searches

- A. Restrict Inventory Searches to the Need to Protect Against Liability:

“The inventory must be reasonably related to its purpose which is the protection of the car owner from loss, and the police or other custodian from liability or unjust claim. It extends to the open areas of the vehicles, including such areas under seats, and other places where property is ordinarily kept, e.g., glove compartments and trunks. It does not permit a *search* of hidden places,

certainly not the removal of car parts in an effort to locate contraband or other property. The owner having no legitimate claim for protection of property so hidden, the police could have no legitimate interest in seeking it out.”

People v. Andrews, 85 Cal. Rptr. 908 (Ct. App. 1970). Note that this approach would overrule *State v. Johnson* 745 P.2d 452 (Utah 1982), which allowed the police to search under the hood of a car as part of an inventory search.

- B. Limit Searches to Items in Plain View: “[N]oninvestigative police inventory searches of automobiles without a warrant must be restricted to safeguarding those articles which are within plain view of the officer's vision.” *State v. Opperman*, 247 N.W.2d 673, 675 (S.D. 1976); see also *State v. Daniel*, 589 P.2d 408, 417 (Alaska 1979) (same); *State v. Sawyer*, 571 P.2d 1131 (Mont. 1077) (same). Courts in Florida, Illinois, Kansas, Maryland, Nevada, New Jersey, New Mexico, New York, Oklahoma, and Wisconsin have also adopted this approach.
- C. Allow drivers “to have a representative present during any inventory that is authorized and [afford them the] right to limit the inventory to only specific portions of the vehicle.” *Wagner v. Commonwealth*, 581 S.W.2d 352, 357 (Ky. 1979).
- D. Pretextual search practices should be defined by statute and banned. *State v. Glenn*, 649 S.W.2d 584, 587-88 (Tenn. 1983); *State v. White*, 958 P.2d 982, 986-87 (Wash. 1998). Indications of pretextual searches include:
 - 1. No need existed to safeguard the defendant’s property. *State v. Atkinson*, 669 P.2d 343, 344 (Or. Ct. App. 1983).
 - 2. Inventorying only contraband and not items legally possessed and also found in a vehicle. *Weintruab v. State*, 871 P.2d 339 (Nev. 1994).
 - 3. Similarly, failing to fill out a standard inventory form. *People v. Johnson*, 803 N.E.2d 385 (N.Y. 2003).
 - 4. Conducting inventory searches by the side of the road and not at the impoundment lot. *Fair v. State*, 627 N.E.2d 427 (Ind. 1993).
 - 5. A different police officer from the one who is investigating the crime should conduct the inventory. *Id.* Using a dedicated officer to perform inventory searches reduces the likelihood that investigating officers are fishing for evidence of a crime as opposed to inventorying vehicles for liability purposes. *Id.*

CONCLUSION

Because the United States Supreme Court has not resolved most issues surrounding inventory searches, the police currently enjoy great latitude in carrying out such searches. This latitude invites abuse and serves as a pretext for general sweeps of vehicles absent suspicion of a crime. Because police searches affect both the guilty and the innocent alike, the Utah Legislature should define the limits on inventory searches and thereby protect the public’s privacy rights.